(16) (10)

Supreme Court, U.S.
FILED
JUN 27 2003
OFFICE OF THE CLERK

No. 02-1574, No. 02-1624

In the
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
MICHAEL A. NEWDOW, ET AL.,
Respondent.

ELK GROVE UNIFIED SCHOOL DISTRICT,
and DAVID W. GORDON, Superintendent, EGUSD,
Petitioners,
v.
MICHAEL A. NEWDOW, ET AL.,
Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR SANDRA L. BANNING IN SUPPORT OF THE PETITIONS FOR CERTIORARI

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June 27, 2003

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QUESTIONS PRESENTED

1. Whether the inclusion of the phrase "under God" in the Pledge of Allegiance to the United States Flag violates the Establishment Clause of the First Amendment.

2. Whether a noncustodial parent, who lacks legal authority to determine his child's education or religious upbringing, has Article III standing to challenge the educational practices undertaken by the school in which the custodial parent has chosen to place the child.

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MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS AND STATEMENT OF INTEREST

Sandra L. Banning respectfully moves this Court for leave to file the accompanying *amicus curiae* brief in support of petitioners, the United States of America and the Elk Grove Unified School District.[1] Petitioners have consented to the filing of this brief. Respondent, Michael A. Newdow, has withheld his consent. (Copies of letters granting and withholding consent are on file with the Clerk of this Court.)

Sandra Banning is the mother and sole legal custodian of the minor child identified as Michael Newdow's daughter and as an unnamed plaintiff in Newdow's lawsuit challenging the constitutionality of the Pledge of Allegiance. Ms. Banning seeks leave to file this brief in order to assist the Court in understanding her and, more importantly, her daughter's interests in this case.

In particular, Ms. Banning seeks to make clear that, while she does not object to Newdow challenging the Pledge in his own name based on injuries (if any) that he himself may have suffered, her daughter has not been harmed in any way by saying the Pledge. Because Ms. Banning is the legal custodial parent, Newdow has no right to dictate what is appropriate for her daughter's education or religious upbringing. He also has no right to represent the child in

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[1] Pursuant to Supreme Court Rule 37.6, Sandra L. Banning states that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than Sandra Banning and her counsel, has contributed monetarily to the preparation or submission of this brief. A trust fund has been established, however, to help defray the costs and expenses incurred by Ms. Banning in connection with this litigation.

court. Ms. Banning does not want her young child to be involved in Newdow's personal litigation battles.

Ms. Banning also supports the petitions for a writ of certiorari. She believes that the Pledge is an important patriotic expression of American ideals, and she wishes for her daughter to be able to recite the Pledge at school. Ms. Banning is particularly concerned by the undemocratic nature of the court of appeals' decision, which, if permitted to stand, would allow Newdow to impose his own agenda and particular sensibilities on everyone else.

For reasons set forth below, if the Court does not summarily reverse, Ms. Banning urges the Court to grant the petitions for a writ of certiorari and reverse after full briefing and argument.

STATEMENT OF FACTS

A. The History Of Ms. Banning And Newdow's Relationship

Sandra Banning is the mother of the minor child identified as an unnamed plaintiff in this lawsuit and, since February 2002, the child's sole legal custodian. Although respondent, Michael Newdow, is the child's biological father, Ms. Banning and Mr. Newdow have never been married.

Ms. Banning has always been her daughter's primary caregiver, and her daughter has always lived with her. Until she turned five, Newdow had little involvement in his daughter's life and visited infrequently. Ms. Banning and Newdow did not enter into any formal custody arrangements, nor was there any regular co-parenting routine.

When her daughter was two months old, Ms. Banning moved at Newdow's request from Sacramento, California, to

a house Newdow owned in Winston-Salem, North Carolina. Newdow asked Ms. Banning to move purportedly so that he could spend time with his daughter on a regular basis. But soon after Ms. Banning moved, Newdow left to live in Guam for a month. Then, when he returned, he immediately accepted a job in Los Angeles, California, and went to live there. In these early months of his daughter's life, Newdow would visit his daughter for two to four days at a time, every six to eight weeks.

In late 1995, when their daughter was fifteen months old, Ms. Banning returned to Sacramento. During this time, she lived in a house owned by Newdow, which he provided in lieu of making child support payments. Ms. Banning and the child lived on their own, while Newdow traveled and, when he was not traveling, lived in Los Angeles. During this period, Newdow visited Ms. Banning and their daughter every three to six weeks.

In 1999, around the time their daughter turned five, Ms. Banning and the child again moved, this time because Newdow served Ms. Banning with a thirty-day notice ordering her to vacate the house that he owned. Around this same time, Newdow tried to enroll the child in public school in Florida. Newdow told Ms. Banning that he believed their daughter would have a superior opportunity to learn Spanish in Florida schools as compared with California schools. *See* Appl. on Mot. for Reconsid., at 6. Newdow also wanted their daughter to move to Florida in order to involve her in a Florida lawsuit he had filed challenging the constitutionality of the Pledge of Allegiance. *See id.* at 7-8, *see also Banning v. Newdow*, No. 99FL04312 (Sup. Ct. of Sacramento County, California). When Ms. Banning made clear that she did not want to move, Newdow suggested "staggered" schooling, with their daughter commuting between

kindergarten in California and Florida every two weeks. *Id.* at 7-8. Newdow urged Ms. Banning to agree to this unusual arrangement because he recognized that not having the child enrolled in a Florida school would "[a]ffect" his "Pledge case li igation — including the issue of 'standing' — and that [he] would have to re-file in California." *See* Newdow Decl. ¶ 21. (Newdow's Florida lawsuit was dismissed for lack of standing in December 1998. *See Newdow v. United States*, No. 98-6585 (S.D. Fla. Dec. 1, 1998), *aff'd* 207 F.3d 662 (11th Cir. 2000).)

Ms. Banning refused. She did not agree that it was in the child's best interests to leave her home in California, nor did she believe that it was appropriate for a five-year-old child to commute thousands of miles every other week in order to simultaneously attend kindergartens in both Florida and California.

Because Newdow continued to press to have his daughter attend kindergarten in Florida, Ms. Banning sought a court order allowing the child to remain enrolled in a California school. The California Superior Court entered an initial custody order, giving Ms. Banning sole physical custody of their daughter (with limited visitation rights to Newdow), and referred Ms. Banning and Newdow to mediation. The mediators considered the issue and agreed that Ms. Banning's daughter should be permitted to attend school in California. Throughout the next few years, Newdow filed various motions in efforts to impose his own wishes concerning his daughter's school. Then, on February 6, 2002, the court granted Ms. Banning sole legal custody. *See* Pet. App. 90a. The court's decision was based in part on an independent psychological evaluation of both parents that concluded that it was in the child's best interests to be in her mother's sole legal care.

Under the custody order, Ms. Banning has the final say in decisions concerning the child's "health, education and welfare." Pet. App. 90a-91a. While both parents are required to "consult with one another on substantial decisions" relating to "medical . . . psychological and educational needs of [the child]," if "mutual agreement is not reached" on any of these issues, "then Ms. Banning may exercise legal control of [the child] that is not specifically prohibited or inconsistent with the physical custody order." Pet. App. 91a.

B. Newdow's Lawsuit and Ms. Banning's Attempts To Intervene

Since 1999, Ms. Banning's daughter has attended public school in Elk Grove, California. In compliance with state law and local ordinance, the teacher leads Ms. Banning's daughter and other students in reciting the Pledge each day as a "patriotic exercise." No student is compelled to recite the Pledge or forced to say the words "under God." Pet. App. 28a.

Shortly after his daughter started kindergarten, Newdow resurrected his challenge to the Pledge—this time in California federal court. He filed this lawsuit seeking a declaration that the 1954 statute adding the words "under God" to the Pledge is facially unconstitutional under the Establishment and Free Exercise Clauses of the First Amendment. According to Newdow, recitation of the Pledge constitutes the "daily indoctrination" of his daughter with "religious dogma." Compl. ¶ 71. Newdow asserted that having his daughter voluntarily recite the Pledge infringed on his "unrestricted right to inculcate in his daughter—free from governmental interference—the atheistic beliefs he finds persuasive." *Id.* ¶ 78.

Despite the fact that the custody order requires both parents to consult on any substantial decision regarding their daughter's education, Newdow never told Ms. Banning before filing his suit of his decision to list their daughter in his Complaint as "an unnamed plaintiff whom he represents as 'next friend.'" *Id.* ¶ 9. As a result, Ms. Banning did not learn that their daughter was involved in Newdow's litigation until the Ninth Circuit issued its panel opinion. *See* Banning Supp. Aff. ¶ 4. While Ms. Banning was well aware of Newdow's atheistic beliefs and his desire to challenge the Pledge's constitutionality, she did not realize that Newdow had used their daughter as a plaintiff in his suit. *See id.* ¶¶ 5-9.

When Ms. Banning discovered that Newdow had brought a lawsuit purportedly on their daughter's behalf, she promptly retained counsel to represent her in federal court and, on August 5, 2002, sought leave to intervene in this litigation. To protect the child, she requested that the Ninth Circuit either grant her motion to intervene, or dismiss the child as an unnamed plaintiff and party to the lawsuit.

Newdow opposed the intervention on the grounds that he had filed a motion for a change of custody, hoping to render moot Ms. Banning's motion to intervene. *See* Banning Supp. Aff. ¶ 2. Newdow's change-of-custody motion was heard by the California Superior Court on August 21, 2002. *See id.* ¶ 3. At this hearing, the court denied the motion and refused to modify the existing custody order. *See id.*

The court then scheduled a second hearing to decide whether Newdow had the right to involve his daughter as her "next friend" in his challenge to the Pledge. After a full hearing on the issue, the court concluded that it was not in the child's best interests to be involved in the litigation. Because there was evidence that the child could potentially

be harmed, and because Ms. Banning did not agree that their daughter should participate, the court held that, even assuming Newdow had joint legal custody (although, in fact, Ms. Banning had sole legal custody), Newdow was not permitted to involve the child as a party to his lawsuit. *See* Pet. App. 91a; *see also* Banning Supp. Aff. ¶ 3(a). The court denied Newdow's motion for reconsideration and affirmed its ruling on September 25, 2002. *See* Banning Supp. Aff. ¶ 3(a).

C. The Ninth Circuit's Decisions

Meanwhile, on June 26, 2002, a divided panel of the Ninth Circuit concluded that Newdow had standing to challenge Elk Grove's policy of reciting the Pledge, and to challenge the facial constitutionality of the 1954 Act amending the Pledge. *See* Pet. App. 25a-58a.

In a separate decision entered on December 4, 2002, the Ninth Circuit panel revisited the question of Newdow's standing in light of Ms. Banning's motion to intervene. *See* Pet. App. 89a-98a. It held that, as a non-custodial parent, Newdow retained "some parental rights" and "may have standing to maintain a federal lawsuit to the extent that his assertion of retained parental rights under state law is not legally incompatible with the custodial parent's assertion of rights." Pet. App. 94a. The panel also made clear that "Newdow cannot name his daughter as a party to a lawsuit against Banning's wishes." Pet. App. 96a.

The Ninth Circuit nonetheless held that Newdow's legal status as a non-custodial parent did not deprive him of standing in his own right to challenge the constitutionality of the Pledge. According to the panel, Newdow suffered cognizable injury in fact because "[t]he pledge to a nation 'under God,' with its imprimatur of governmental sanction,

provides the message to Newdow's young daughter not only that non-believers, or believers in non-Judeo-Christian religions, are outsiders, but more specifically that her *father's* beliefs are those of an outsider, and necessarily inferior to what she is exposed to in the classroom." Pet. App. 97a (emphasis in original).

SUMMARY OF ARGUMENT

Sandra Banning has *sole* legal custody of her daughter. Accordingly, Ms. Banning, not Newdow, has the right and responsibility to decide ultimately where her daughter goes to school and what education her daughter should receive. It is therefore significant that neither Ms. Banning nor her daughter objects to saying the Pledge. To the contrary, Ms. Banning believes that the Pledge is an important, patriotic expression of American ideals that reflects the democratic beliefs of a diverse society. Ms. Banning wants her daughter to appreciate, and participate in, the traditional recitation of the Pledge.

If the Court grants certiorari, Ms. Banning intends to file an *amicus* brief discussing reasons why the Pledge is constitutional under settled Establishment Clause principles. In particular, Ms. Banning will explain that, as this Court has repeatedly recognized, the words "under God" in the Pledge are not intended to establish any religion, but to invoke certain civic ideas and ideals. These ideas and ideals appear and reappear in the most central documents of the American political tradition, which (like the Pledge) recognize the religious beliefs and practices of the American people as an ineradicable dimension of our national history and culture.

ARGUMENT

I. IN CONSIDERING THE PETITION, THE COURT SHOULD BE AWARE OF THE INTERESTS OF MS. BANNING AND HER DAUGHTER

Newdow's lawsuit challenging the constitutionality of the Pledge was brought on behalf of his daughter, purportedly as her "next friend." Compl. ¶ 9. Newdow lacks authority, however, to sue on his daughter's behalf. The undisputed facts show that Ms. Banning, not Newdow, has sole legal custody of their daughter. And neither Ms. Banning, nor her daughter, objects to saying the Pledge.

A. Ms. Banning Has Sole Legal Custody Of Her Daughter

Ms. Banning is the "sole legal custod[ian]" of her daughter. She alone has the ultimate right "to make the decisions relating to" her daughter's "health, education and welfare." Cal. Family Code § 3006 (West 1994). Indeed, the custody order entered by the California Superior Court specifically determined that it was not in the child's best interest either for Newdow to have legal custodial rights or for him to be able to involve his daughter in his litigation adventures.

Nonetheless, Ms. Banning has encouraged Newdow to be a positive influence in his daughter's life. She has consulted with Newdow on substantial decisions relating to their daughter's psychological and educational needs. *See* Pet. App. 91a. She has not sought to prevent Newdow from discussing his beliefs about religion or politics with their daughter when he visits.

But where, as here, the two parents are unable to reach agreement with respect to their child's upbringing, it is

unequivocally Ms. Banning's prerogative and responsibility, as sole legal custodial parent, to decide what is in the child's best interest. As a matter of state law, the legal custodial parent alone has the right to decide ultimately which school the child will attend. She also has sole authority to make ultimate decisions concerning what religious education the child should receive. *See In re Marriage of Murga*, 103 Cal. App. 3d 498, 505 (1980).

B. Neither Ms. Banning Nor Her Daughter Objects To The Pledge Of Allegiance

Neither Ms. Banning nor her daughter objects to saying the Pledge in the course of daily patriotic exercises in public school. To the contrary, Ms. Banning has always believed—and has taught her child—that the Pledge embodies an important expression of American ideals. In her view, the Pledge has long been part of the fabric of our society, and thus reciting the Pledge is rooted in this country's fundamental traditions. In particular, Ms. Banning considers the Pledge a part of the American tradition of inclusiveness—one that reflects the democratic beliefs of a diverse society.

Although Ms. Banning is a Christian, and intends to raise her daughter in the Christian faith, Ms. Banning does not expect her daughter to be inculcated with religious beliefs through reciting the Pledge at school. Such inculcation properly occurs at home and church. The Pledge, in contrast, is an expression of patriotic sentiment consistent with a wide range of religious and moral values.

It bears emphasis that Ms. Banning has never stood in the way of Newdow sharing with their daughter his own views with respect to religion. Ms. Banning understands that her daughter, when she reaches an appropriate age, will have to

decide for herself what religious and moral values to embrace. But Ms. Banning also wants to instill in the child an appropriate understanding and respect for the ideals, principles, and spirit on which this country was founded. Just as Ms. Banning wishes her daughter to celebrate the traditional Thanksgiving holiday, Ms. Banning also wants her daughter to participate in the traditional recitation of the Pledge. In Ms. Banning's view, reciting the Pledge (like celebrating Thanksgiving) is a patriotic recognition of the most fundamental beliefs and practices of the American people that are an important aspect of our national history and culture.

Ms. Banning is therefore profoundly concerned about the undemocratic character of the court of appeals' decision. California law permits individual school districts to choose their own "patriotic exercises." Pet. App. 3a n.1; *see also* Cal. Educ. Code § 52720 (West 1989). And the Elk Grove school district gives parents and their children the right to decide for themselves, based on their own consciences, whether or not to say the Pledge, or even whether to say the Pledge, but not the words "under God." Pet. App. 28a. Ms. Banning agrees with this flexible policy, which ensures that reciting the Pledge is voluntary, not compulsory.

Newdow, however, seeks to impose his own idiosyncratic agenda on everyone else. He would force *all* public schools to banish entirely any statement that might be construed as a reference to religious values, no matter how benign, latitudinarian, or important that expression to the inculcation of civic virtue. Newdow also seeks to prevent schools from using the Pledge to acknowledge practices dear to the American people as a central aspect of our national history and culture.

More immediately, Newdow would use his beliefs to interfere directly with Ms. Banning's wishes that her child participate in traditional patriotic practices. While Ms. Banning has decided that her daughter should attend a public school where the Pledge is recited, Newdow would effectively usurp the right, impose his own will, and negate the choice that Ms Banning enjoys, as the child's legal custodian.

Accordingly, if Newdow has any right to challenge the Pledge at all, it must be a right grounded in a case brought in his own name and based on injuries (if any) he himself may have suffered. *Cf. Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) ("Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children"). Because neither Ms. Banning nor her daughter objects to the Pledge, and because Ms. Banning is the child's sole legal custodian, Newdow should not be permitted to use his daughter in his efforts to impose his own private notions on the entire body of California school children.

II. IF THE COURT GRANTS CERTIORARI, MS. BANNING WILL DISCUSS THE REASONS WHY THE PLEDGE IS CONSTITUTIONAL

If the Court grants the petitions for certiorari, Ms. Banning will address at the merits stage the underlying substantive issue under settled Establishment Clause principles. In particular, she will argue that allowing schoolchildren voluntarily to recite the Pledge is not an impermissible establishment of religion, but, on the contrary, is an expression of patriotism.

Briefly stated, this Court has repeatedly recognized that the reference to "under God" in the Pledge is designed to

invoke certain civic ideas and ideals. These ideas appear and reappear in the most central documents of the American political tradition, including the Declaration of Independence, the Gettysburg Address, and the Constitutions of numerous states. *See* Pet. App. 70a; *cf. Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962). Among others, these ideas include the notion (i) that there is a superhuman ordering to human affairs, which governs the destiny of nations; (ii) that citizens should commit themselves to the interests of their country beyond what might be required by their own narrow sphere of self-interest; and (iii) that there is a fundamental human dignity in each and every person. Significantly, these ideas are the common heritage of many systems of belief.

As Justice Brennan noted almost twenty years ago, the words used in the Pledge should be understood, not as conveying some fixed "religious content," but rather as a means to "inspiring commitment" to American ideals. *Lynch v. Donnelly*, 465 U.S. 668, 716-17 (1984) (Brennan, J., dissenting). The words "under God" in the Pledge are also part of a long-held tradition of recognizing, in an especially appropriate way, the religious beliefs and practices of the American people as an ineradicable dimension of our national history and culture. *See Marsh v. Chambers*, 463 U.S. 783 (1983).

Accordingly, rather than allowing Newdow to impose his particularistic views on everyone else, this Court's Establishment Clause jurisprudence has reflected a more nuanced approach. Were it to address the merits, this Court should remain true to this well-charted course. Most importantly, it should continue to assiduously respect individuals' freedom of conscience, while at the same time protecting the nation's right to summon up its history, tradition, and civic ideals.

CONCLUSION

For the foregoing reasons, the court of appeals' decision should be summarily reversed. Alternatively, the petitions for a writ of certiorari should be granted.

Respectfully submitted,

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